Supreme Court, U.S.
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NO. 90-171

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

JAMES PETER NALBANDIAN,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

Does the unsolicited comment of one juror constitute a verdict for the purposes of double jeoardy analysis?

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OPINION BELOW

On June 27, 1989, the Arizona Court of Appeals affirmed the trial court's granting of a new trial because the jurors in the first trial had deadlocked. Nalbandian v. Superior Court, 163 Ariz. 126, 786 P.2d 977 (Ct. App. 1989). The Arizona Supreme Court denied review on February 26, 1990. Id.

STATEMENT OF JURISDICTION

The Arizona Supreme Court declined to review petitioner's case on February 26, 1990. Petitioner filed his petition on May 21, 1990, within the 90 days required by Rule 13.1, Rules of the United States Supreme Court. This Court has jurisdiction pursuant to United States Constitution, Article III, § 2; 28 U.S.C.A. § 1257(a); Rule 20.1, Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution:

> **§ 1. Citizenship rights not to be abridged by states**
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Nalbandian was charged with aggravated assault on a child under 15 years of age. Trial began before a jury in this matter on April 19, 1988. Following trial, and during the jury deliberation process, the trial court received communications from members of the jury indicating, inter alia, the following:

> The jury requests a copy of the transcript of the trial. Plus a calendar from 1986. Signed, T. Sandford 5/6/88, 9:20.

The trial court contacted the attorneys, and after discussion, the trial court returned the following response:

> The entire trial was not transcribed, only portions were. Therefore, please rely on your memories.

In addition, the trial court provided a copy of a 1986 calendar for the jury.

The next note received by the trial court from the jury read:

The jury cannot make a decision with the facts provided.

The trial court noted that this note came after approximately 6 hours of deliberation. The trial judge indicated to trial counsel that he would follow standard procedure by asking the jurors if there was any reasonable probability that they could reach a verdict within a reasonable time, without asking that they reveal how they were voting; he would also ask if anyone believed additional time would be helpful. If so, the trial court would ask them to return to their deliberations.

The state indicated that it would prefer the jurors to continue deliberating, but noted that, if they were hopelessly deadlocked, the state would rather retry the case. Defense counsel, on the other hand, requested

that the trial court declare a mistrial at that time. Defense counsel stated:

> I think they have had adequate time to deliberate and reach a verdict and the Court should declare a mistrial and I object to the giving of the instruction from the Bench book.

The trial court addressed Jury Foreman Sandford, and asked him whether there was a reasonable probability that the jury could reach a verdict with additional time. Jury Foreman Sandford replied that additional time could assist them. Three jurors raised their hands, indicating that they disagreed with Mr. Sanford. The trial court, after meeting with counsel at sidebar, instructed the jurors that they should continue deliberating for another hour or so. The court stated:

> I don't want you to feel pressured to reach a verdict one way or the other. If you can't reach a verdict, so be it. We will give it another hour and see where we

are then. We will stand in recess until about 4:40. Thank you.

Juror Margaret Kobert then addressed the trial judge and asked him whether she could ask a question without the presence of the attorneys. The trial court indicated that that was not the usual procedure, and requested that she write any questions down, so that the lawyers and the trial court could formulate an answer together. Prior to discussing Mrs. Kobert's question, defense counsel again requested that the trial court grant a mistrial. Defense counsel made the following argument:

> MR. SCOTT: Yes, your Honor. The Court querried [sic] the jury foreman who indicated maybe some additional time might be okay. Then the court querried [sic] further, and as I recall, there were three people who raised their hand, I can't remember their names, one male and two females, who said that additional time would not be beneficial. We are

> talking about a five to three situation, your Honor. At the Sidebar I ask the Court to declare a mistrial. Number one, under the facts of this case, the charges are not that complicated.
>
> Number two, we are dealing with a mandatory sentencing situation which the jury is not, obviously, aware of.
>
> Number three, I am afraid that they feel pressured to make a decision ultimately to the Defendant's prejudice.
>
> The fact the State doesn't want to go to the expense, which is an argument of the State, and put the child through it again. There are other remedies such as dismissal.
>
> So, it was for those reasons I objected to the court sending the jury back for additional deliberation until 4:30.

The prosecutor argued that the trial court's actions were appropriate, given that five jurors indicated that, with more time, they possibly could reach a verdict. The trial court denied the requested mistrial.

The trial judge then received two notes in the following order:

> All eight of us feel that the state did not prove that Jim did the abuse. But two people think he probably did do it (a gut feeling). They do not want him to go free. /s/Mrs. Kobert.
>
> If there is any additional evidence, may we see it? [unsigned]

Defense counsel then withdrew his motion for a mistrial and an off-the-record discussion ensued.

In response to Mrs. Kobert's note, the trial court proposed the following response:

> There is no additional evidence for you to see. Please continue to deliberate until 4:30 p.m. or until you reach a verdict. Please keep in mind all of the previous jury instructions.

At this point, defense counsel requested the trial court to enter a verdict of not guilty in response to the note signed by Mrs. Kobert. The trial court indicated

that Mrs. Kobert's comment was not a verdict, but defense counsel requested that the trial court poll the jury to determine whether, in fact, it was. Defense counsel insisted that the trial court read Mrs. Kobert's note to the entire jury panel and ask them if they all agreed with Mrs. Kobert that the state failed to prove its case. If, in fact, the other jurors agreed, defense counsel requested that the trial court direct them to return with a not guilty verdict, signed in the appropriate fashion.

The prosecutor noted that the jurors should not be polled until a formal verdict, signed by the foreman, was received. Since no form of verdict had been signed and received in court, the prosecutor objected to the proposed procedure by defense counsel. The

prosecutor stated that such a poll would put undue pressure on the jurors, and suggested that they return to their deliberations. The prosecutor noted that, if the situation were reversed, the trial court would be prevented from making such an inquiry, since it would amount to requesting a vote regarding the deliberations.

The trial court indicated that it would respond as follows:

> There is no additional evidence for you to see. Please continue to deliberate until 4:30. Please keep in mind all the previous instructions. If you reach a verdict before 4:30, let me know.

At 4:40 p.m., the trial court reconvened the parties in open court. The trial court inquired, through the jury foreman, whether the jury had reached a verdict. Jury Foreman Sandford replied that they had not. The trial

court inquired whether there was any reasonable probability that the jury would be able to reach a verdict, and Mr. Sandford, the foreman, replied that he did not believe that the jury would be able to decide a verdict. Upon inquiry, when none of the other jurors disagreed with what Mr. Sandford said, the trial court declared a mistrial because the jury was deadlocked. The trial court then set this matter for a retrial and discharged the jurors.

When the parties reconvened in chambers, defense counsel placed his objection on the record to the trial court discharging the jury, and insisted that Mrs. Kobert's note constituted a verdict of not guilty. Defense counsel submitted that the trial court should have inquired of the jury over the state's objection, regarding the

consensus in Mrs. Kobert's opinion. The trial court refused to change its position.

Defense counsel then filed a motion for entry of verdict of not guilty, which the trial court denied on June 20, 1988. In its minute entry, the trial court noted that, after twice inquiring whether the jurors had a verdict, and concluding that they were hopelessly deadlocked, the mistrial was the appropriate remedy. In the words of Judge Silverman: "Calling Mrs. Kobert's note a not guilty verdict does not make it one." The appellate court agreed.

ARGUMENT

THE RECORD SUPPORTS THE TRIAL COURT'S DETERMINATION THAT THE JURY WAS DEADLOCKED AND THERE WAS NO DOUBLE JEOPARDY BAR TO A RETRIAL OF PETITIONER.

Petitioner claims a double jeopardy violation in the trial court's decision to declare a mistrial due to a hung jury and to set the matter for retrial. Respondent believes that the trial court's action was proper under this Court's decisions in Richardson v. United States, 468 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1982), and Arizona v. Washington, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978). The real dispute in this case is the significance of one juror's unsolicited note giving her opinion about the alleged opinions of every other juror. Petitioner argued below that the note was equivalent to an acquittal. Respondent maintains that it

was one in a series of manifestations that this was truly a deadlocked jury.[1]

The petition fails to mention some pertinent Arizona procedural law. An Arizona trial court is not permitted to inquire into any numerical division within a jury. State v. Roberts, 131 Ariz. 513, 642 P.2d 858 (1982). A trial court is not permitted to consider any inquiry into the subjective motives or

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1. Before discussing the law respondent wishes to point out that on remand petitioner did not seek a stay but entered a guilty plea to attempted aggravated assault in this case. On October 9, 1990, the trial court placed him on 4-years probation with one year in jail as stipulated in the plea agreement. That case has not yet reached the Arizona appellate court. Respondent recognizes that a counseled plea of guilty does not waive a claim of double jeopardy. Menna v. New York, 423 U.S. 61, 96 S. Ct. 241, 46 L. Ed. 2d 195 (1975). However, the case presently before this Court may be moot because there is no relief this Court can grant that would carry out the purpose of the double jeopardy clause.

mental processes of jurors. State v. Sands, 145 Ariz. 269, 700 P.2d 1369 (Ct. App. 1985); State v. Snowden, 138 Ariz. 402, 675 P.2d 289 (Ct. App. 1983). A verdict must be in writing, signed by the foreman and returned to the judge in open court. Rule 23.1(a), Ariz. R. Crim. P. Unless the trial court receives a signed verdict it is under no obligation to poll the jury. Rule 23.4, Ariz. R. Crim. P.

Before turning to the controlling decisions in Richardson and Arizona v. Washington, respondent must disagree with factual statements in the petition. Petitioner has recast his argument somewhat. In the Arizona courts he argued only that the note from the single juror was equivalent to a verdict. Nalbandian, 163 Ariz. at 131, 786 P.2d at 982. He did not argue as he does to this Court that the jurors were "going to

acquit" or "about to acquit" and that the trial court cut off deliberations quickly and declared a mistrial without notice and without attempting to instruct the jury further to alleviate confusion.

Not only are these different arguments than those raised in the state courts, they have no support in the record in this case. The indication was so strong that this jury could not reach a verdict before Mrs. Kobert volunteered her note, that petitioner himself requested a mistrial on the ground of deadlock. He withdrew that request when the Kobert note appeared, but the facts certainly show that the trial court did not act precipitiously and without notice to the defense. In fact, the judge denied petitioner's initial request and sent them back to try again.

Secondly, there was no request to reinstruct the jury with respect to the burden of proof. Nor was there any indication they were confused about any of the court's instructions. It is pure fantasy to read into their requests for more evidence any indication that they were confused about the instructions. And there was never a unanimous agreement by the jurors on anything. Mrs. Kobert's note is only an expression of her personal opinion about what other jurors were thinking. Petitioner did not allege in the state courts that there was judicial or prosecutorial impropriety in rushing to a mistrial in order to avoid an acquittal nor does the record suggest anything of the sort. This Court does not review federal claims that were not raised in state court. Illinois v.

Gates, 454 U.S. 1140, 102 S. Ct. 997, 71 L. Ed. 2d 291 (1983).

Assuming that petitioner's claims were raised in state court, they are nonetheless without merit. This Court discussed mistrial based upon a deadlocked jury in Arizona v. Washington:

> At the other extreme is the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial. The argument that a jury's inability to agree establishes reasonable doubt as to the defendant's guilt, and therefore requires acquittal, has been uniformly rejected in this country. Instead, without exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws.
>
> Moreover, in this situation there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not

"manifest necessity" justifies a discharge of the jury. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of this "valued right to have his trial completed by a particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherring in the situation rather than the considered judgment of all the jurors. If retrial of the defendant were barred whenever an appellate court views the "necessity" for a mistrial differently from the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference by the reviewing court.

Arizona v. Washington, 434 U.S. 509, 98 S. Ct. at 832, 54 L. Ed. 2d at 726 (footnotes omitted). This deference is

based on such factors as the trial judge's ability to observe the jurors and what went on in the courtroom. 434 U.S. at 510 n.28, 98 S. Ct. at 833 n.28, 54 L. Ed. 2d at 727 n.28.

Petitioner claims at page 17 of the petition that this Court's decision in Richardson v. United States, 468 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1982), casts doubt on the manifest necessity requirement for declaration of a mistrial in a hung jury case. The case does no such thing. Richardson held that the double jeopardy clause does not bar retrial because of a hung jury regardless of any claimed evidentiary insufficiency at the first trial. The decision states that it has been established since 1824 that a failure of the jury to agree on a verdict was an instance of manifest necessity which permitted a trial judge

to terminate the first trial and retry the defendant. 468 U.S. at 324, 104 S. Ct. at 3085, 82 L. Ed. 2d at 248. That is how the circuit courts are interpreting this decision. A mistrial due to a hung jury is the paradigm example of manifest necessity found on the very highest end of the manifest necessity continuum where the trial court is afforded the most deference. See, e.g., United States v. Crotwell, 896 F.2d 437 (10th Cir. 1990); United States v. Byrski, 854 F.2d 955 (7th Cir. 1988); United States v. Salvador, 740 F.2d 752 (9th Cir. 1984), cert. denied, 469 U.S. 1196 (1985).

The dissent in Richardson did not disagree on the basic precept that double jeopardy did not preclude a retrial where there was a jury deadlock. The dissent was focusing on Richardson's claim that

there had been insufficient evidence presented in his multiple count case to convict. That same claim, rejected by the majority, is not even present in this single-count case. With respect to the Richardson's dissent's incongruity referred to at page 17-18 of the petition, one circuit court has stated that there are no equities to be balanced because the double jeopardy clause has declared a constitutional policy based on grounds which are not open to judicial examination. United States v. Ustica, 847 F.2d 42, 50 (2d Cir. 1988), quoting Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

Petitioner also claims that the trial judge is required to consider other alternatives before declaring a mistrial due to the jurors' inability to agree on a verdict. A trial judge is not required

to inquire behind an announced deadlock on the assumption that jurors have misunderstood the court's instructions. United States v. MacQueen, 596 F.2d 76, 82 (2d Cir. 1978); see also Fay v. McCotter, 765 F.2d 475 (5th Cir. 1985) (a trial judge does not err for failing to consider or adopt a specific alternative for a mistrial). Furthermore, federal law is consistent with Arizona law on the probing of the jurors' mental processes. It is not done to impeach a verdict or a deadlock. MacQueen, 596 F.2d at 83.

Lastly, petitioner relies on a Georgia state case called Cobb v. State, 246 Ga. 619, 272 S.E. 2d 296 (1980). Cobb was not a jury deadlock case. Deliberations were halted after only 13 minutes which included the selection of the jury foreman. Petitioner's jury deliberated 6 hours. They were sent back to try again.

They came back again after another hour and the foreman announced that a verdict was impossible. When queried collectively the other jurors did not disagree with his assessment. The record supports the Arizona trial court's declaration of a hung jury and ordering of a retrial.

CONCLUSION

The petitioner in this case subsequently pled guilty while simultaneously seeking relief from this Court on double jeopardy grounds. This case involves a purely factual dispute about the significance of an unsolicited note from a single juror. The record supports the Arizona trial court's conclusion that the jury was deadlocked. The law supports the trial court's decision to set the matter for retrial.

Respondent requests that this Court deny the petition.

DATED this 2nd day of November, 1990.

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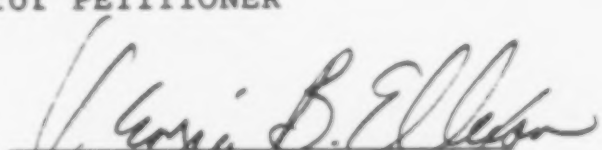

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